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No. 08-833

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

KHRISTIAN OLIVER,

Petitioner,

v.

NATHANIEL QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF FORMER FEDERAL AND STATE PROSECUTORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE [1]

Amici are former federal and state prosecutors committed to the fair and impartial administration of justice in accordance with the United States Constitution. *Amici* believe it is important for this Court to address the recurring and important issue of jury consultation of the Bible, which *amici* believe is constitutionally prohibited as an improper outside influence on the jury. *Amici* are concerned that the division among U.S. Courts of Appeals on this issue enables tainted capital sentences to stand and undermines public confidence in the ability of the U.S. criminal justice system to render unbiased judgments. For the same reasons, *amici* also ask this Court to resolve the division among U.S. Courts of Appeals regarding the standard to be applied in evaluating allegations that a jury improperly consulted the Bible during its deliberations.

SUMMARY OF THE ARGUMENT

A jury that consults the Bible during sentencing deliberations is exposed to an outside influence in violation of the Sixth Amendment's guarantee of a fair trial by an impartial jury. Because U.S. Courts of Appeals are divided on this proposition, *amici* believe that this Court should

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[1] No counsel for a party authored this brief in whole or in part and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. The parties received timely notice of *amici*'s intent to file this brief and granted written consent, attached here. *Amici* are listed in the attached appendix.

grant certiorari here. This Court should also take this opportunity to settle the law regarding the appropriate standard to be used in evaluating claims of juror Bible consultation.

Even under ordinary circumstances, deprivation of a constitutional right is of the utmost concern. Such concern is all the greater here, where the constitutional violation occurs in the context of jurors' decision to impose the ultimate punishment.

REASONS FOR GRANTING THE PETITION

A. REVIEW IS WARRANTED BECAUSE CLARIFYING THE SIXTH AMENDMENT'S PROTECTIONS IN THE CAPITAL SENTENCING CONTEXT IS UNIQUELY IMPORTANT.

The lower courts urgently need guidance on the scope of the constitutional protections afforded to defendants who are sentenced to death by juries that have consulted the Bible during deliberations.

The Sixth Amendment right to a jury trial guarantees a defendant that a jury's verdict will be based on the evidence presented at trial, the court's jury instructions, and nothing beyond the bounds of the jury room. *Tanner v. United States*, 483 U.S. 107 (1987). Protecting this right is all the more important when a jury is deciding a capital case, because "the penalty of death is qualitatively different from a sentence of imprisonment," such that "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific

case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *see also Furman v. Georgia*, 408 U.S. 238, 289 (1972) (Douglas, J., concurring) ("Death . . . is in a class by itself."). As this Court held more than a century ago: "[i]t is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated." *Mattox v. United States*, 146 U.S. 140, 149-50 (1892).

To enable our courts to fulfill their constitutional mandate, enormous public resources are invested in the capital litigation process.[2] Juror consultation of

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[2] *See* E. Michael McCann, *Opposing Capital Punishment: A Prosecutor's Perspective*, 79 MARQ. L. REV. 649, 697 (1996) (noting the costs in various states of adopting capital punishment, including North Carolina ($2.6 million per case in 1993), Florida ($3.2 million per case in 1988), Texas ($2.3 million per case in 1992), New York ($118 million projected annually on all cases, in 1995), and California ($90 million per year in 1992). As the number of years the average death row inmate waits between sentencing and execution has increased dramatically over the last thirty years, from 51 months (more than four years) in 1977 to 153 months (almost 13 years) in 2007, one can assume these costs have also risen. Bureau of Justice Statistics, U.S. Dep't of Justice, *Capital Punishment, 2007 - Statistical Tables*, Jan. 2009, http://www.ojp.usdoj.gov/bjs/pub/html/cp/2007/cp07st.htm; *see also* Robert M. Morgenthau, *What Prosecutors Won't Tell You*, N.Y.TIMES, Feb. 7, 1995 at A11 (arguing that the death penalty hinders the fight against crime, as resources spent on capital punishment litigation could be better spent on preventing recidivism). Thirty-seven of the 38 states with capital statutes fund a mandatory appeals process. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUBL'N NO. NCJ215083, CAPITAL PUNISHMENT, 2005 (Jan. 2007) (available at http://www.ojp.usdoj.gov/bjs/pub/pdf/cpo5.pdf.

extraneous sources, including the Bible, is a recurring issue in such litigation.[3] Unfortunately, the Courts of Appeals have failed to agree upon clear rules for evaluating defendants' claims for relief based on juror Bible consultation. On the contrary, they are creating an ever-larger body of jurisprudence that is conspicuous for its irreconcilable holdings and, in several cases, disregard of well-established constitutional rights.

The lack of consensus among the U.S. Courts of Appeals regarding juror consultation of the Bible in the capital context not only generates inconsistent outcomes, it also creates the appearance of arbitrariness in an area that demands consistency and fairness. This discord can undermine public confidence in the capacity of the criminal justice system to administer the death penalty.[4] The guidance of this Court is therefore urgently needed.

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[3] *See* Oliver Petition for Writ of Certiorari, 19 fn.12.

[4] Ken Armstrong & Steve Mills, *O'Connor Questions Fairness of Death Penalty; Justice Rethinking Laws She Shaped*, CHI. TRIB., Jul. 4, 2001, at N1 (stating that former Justice Sandra Day O'Connor stated that "[a]fter 20 years on the high court, I have to acknowledge that serious questions are being raised about whether the death penalty is being fairly administered in this country"); Joshua Herman, *Death Denies Due Process: Evaluating Due Process Challenges to the Federal Death Penalty Act*, 53 DEPAUL L. REV. 1777, 1782-85, 1788-90 (2004) (citing moratoriums and studies on carrying out capital punishment in numerous states, as evidence of a "nationwide reevaluation of capital punishment" caused in part by wrongful convictions that "challenge the public's confidence in the death penalty's reliability and fairness").

B. REVIEW IS WARRANTED BECAUSE THE COURT SHOULD RESOLVE A SPLIT AMONG THE U.S. COURTS OF APPEALS OVER WHETHER THE SIXTH AMENDMENT PROHIBITS JURORS FROM BRINGING THE BIBLE INTO THE JURY ROOM FOR USE IN DELIBERATIONS.

Despite this Court's clear holding that the Sixth Amendment requires a jury's decisionmaking be free from any and all "external causes," *Mattox*, 146 U.S. at 149, there is a conflict among the U.S. Courts of Appeals over whether juror consultation of the Bible during deliberations is constitutionally prohibited.

In this case, the Fifth Circuit held that the jury's consultation of the Bible during sentencing was controlled by "clearly established Supreme Court precedents" prohibiting external influences. *Oliver v. Quarterman*, 541 F.3d 329, 336 (5th Cir. 2008), *citing Parker v. Gladden*, 385 U.S. 363 (1966) (per curiam), *Turner v. Louisiana*, 379 U.S. 466 (1965), and *Remmer v. United States*, 347 U.S. 227 (1954). The Fifth Circuit noted that the "Supreme Court counsels us that a juror may not consult material that is outside the law of the case" and found that the jury's consideration of the Bible "crossed an important line" and thus deprived petitioner of his Sixth Amendment rights. *Oliver*, 541 F.3d at 339.

The Eleventh Circuit took a similar view in *McNair v. Campbell*, 416 F.3d 1291 (11th Cir. 2005). There, a Christian minister, who served as the foreman of the defendant's jury, brought a Bible into the jury room. During deliberations, the foreperson read aloud from the Bible and led the other jurors in prayer. *Id.* at 1308.

The Eleventh Circuit held that it was undisputed that the jurors improperly considered extrinsic evidence during their deliberations in violation of the defendant's Sixth Amendment rights. *Id.*[5]

In stark contrast, the Fourth Circuit has repeatedly rejected the view that juror consultation of the Bible is a constitutionally prohibited external influence. For example, in *Robinson v. Polk*, 438 F.3d 350, 364 (4th Cir. 2006), the court found that the Bible could be an "internal" influence as to jurors. *See also Billings v. Polk*, 441 F.3d 238 (4th Cir. 2006); *Lenz v. Washington*, 444 F.3d 295 (4th Cir. 2006); *Burch v. Corcoran*, 273 F.3d 577 (4th Cir. 2001).

The Ninth Circuit has likewise found that juror consultation of the Bible is constitutionally permissible. In *Fields v. Brown*, 503 F.3d 755 (9th Cir. 2007), a plurality found no juror misconduct where the jury foreperson shared with the rest of the jury transcriptions of Bible verses "for" and "against" the death penalty. The Ninth Circuit observed that the Biblical references in the foreperson's notes were "notions of general currency that inform the moral judgment that capital-case jurors are called upon to make." *Id.* at 780. The plurality concluded that where a juror reads passages from the Bible that are matters of "common knowledge," the defendant's Sixth Amendment rights are not violated. *Id.* at 779-80.

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[5] Outside the habeas context, the First Circuit has observed that jury consultation of the Bible could be an external influence. *See United States v. Lara-Ramirez*, 519 F.3d 76, 89 (1st Cir. 2008).

As demonstrated below, the only rule that can be squared with this Court's Sixth Amendment jurisprudence is one that treats the Bible as an external influence that may not be consulted by the jury during deliberations.

C. REVIEW IS WARRANTED BECAUSE THE IRRECONCILABLE CONFLICT AMONG U.S. COURTS OF APPEALS REGARDING WHAT CONSTITUTES OUTSIDE INFLUENCE ON A JURY RAISES IMPORTANT SIXTH AMENDMENT ISSUES ON WHICH THIS COURT'S GUIDANCE IS NEEDED.

Review is warranted because this Court's precedents dictate that a jury's consultation of the Bible during deliberations is unconstitutional. The Constitution requires that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial . . . by an impartial jury. . . ."[6] U.S. CONST. amend. VI; *see also Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (holding that the Sixth Amendment jury-trial right "guarantees to the criminally accused a fair trial . . . .").[7]

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[6] The Fourteenth Amendment extends the guarantees of the Sixth Amendment to the states. *Parker v. Gladden*, 385 U.S. 363, 364 (1966); *see also Morgan v. Illinois*, 504 U.S. 719, 726-27 (1992).

[7] Another Sixth Amendment guarantee may also come to bear here: the confrontation clause, which guarantees the accused the right to confront witnesses against him. *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965) (finding that the confrontation clause "necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel").

The Constitutional right to a "fair trial" by an "impartial jury" is violated when a jury's deliberations are influenced by sources beyond the evidence introduced at trial and judge's instructions regarding the law. For instance, in the leading case of *Remmer v. United States*, this Court held that an unnamed person's attempt to bribe a jury foreperson was a constitutionally prohibited outside influence. The *Remmer* court set forth the following general rule:

> In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Remmer, 347 U.S. at 229; *see also Parker*, 385 U.S. at 363-64 (holding that there was an outside influence in violation of the Sixth Amendment where bailiff told juror that defendant was a "wicked fellow" who was guilty); *Turner*, 379 U.S. at 473-74 (holding that there was an outside influence in violation of the Fourteenth and Sixth Amendments where jury had "continuous and intimate

association" with sheriffs who were also key government witnesses); *Robinson v. Polk*, 444 F.3d 225, 231 (4th Cir. 2006) (King, J., dissenting) ("external influences . . . share a single, constitutionally significant characteristic: they are external to the evidence and law in the case, and carry the potential to bias the jury against the defendant"); *Wisehart v. Davis*, 408 F.3d 321, 326 (7th Cir. 2005) (Posner, J.) (holding that *Remmer* applies where there has been "extraneous communication . . . that creates a reasonable suspicion that . . . defendant was deprived of his right to an impartial jury").

Similarly, in *Mattox v. United States*, jurors in a capital case read a newspaper article about the trial and heard statements from a bailiff that included facts not in evidence and conclusions about defendant's guilt. Although this Court did not reference the Sixth Amendment, it held that the trial court committed reversible error in failing to investigate such "extraneous influence[s]," because "[i]t is vital in capital cases that the jury should pass upon the case free from external causes . . . ." *Mattox*, 146 U.S. at 149.

This Court clarified what is *not* a constitutionally prohibited outside influence in *Tanner v. United States*. There, petitioners were convicted of fraud in federal court. Citing Rule 606(b) of the Federal Rules of Evidence, the district court refused to admit post-verdict juror affidavits alleging that several jurors were often

intoxicated during the trial.[8] This Court affirmed the district court's decision, explaining that outside influences involve potentially prejudicial "information." By contrast, intoxication — like the effects of "a virus, poorly prepared food . . . a lack of sleep," or mental incompetence — is an "internal" influence that is shielded from inquiry. *Tanner*, 483 U.S. at 117, 119, 122.

In accordance with the above precedents, courts have found outside influence where a deliberating jury is exposed to *information* that (1) is outside the evidence and law in the case and (2) can potentially contribute to a jury decision that is hostile to the defendant. For example:

- In *United States v. Aguirre*, 108 F.3d 1284, 1288 (10th Cir. 1997), where the government alleged a conspiracy to distribute drugs, the jury consulted a dictionary for the definition of "distribution." The Tenth Circuit held that this "exposure to extrinsic information" was an outside influence.

- Juror consultation of a dictionary was also at issue in *United States v. Martinez*, 14 F.3d 543, 550-51 (11th Cir. 1994), an action for

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[8] Rule 606(b) of the Federal Rules of Evidence bars juror testimony concerning "(1) the method or arguments of the jury's deliberations, (2) the effect of any particular thing upon an outcome in the deliberations, (3) the mindset or emotions of any juror during deliberations, and (4) the testifying juror's own mental process during the deliberations." *United States v. Jones*, 132 F.3d 232, 245 (5th Cir. 1998); *see also Hard v. Burlington N. R.R.*, 870 F.2d 1454, 1461 (9th Cir. 1989).

racketeering and extortion. The court, citing *Remmer*, 347 U.S. at 229, found that there was a constitutionally prohibited outside influence where jurors looked up the definition of "deliberate" and other "technical" words while also becoming aware of media accounts of the trial and learning the potential prison sentence faced by the defendant.[9]

- In *United States v. Bassler*, 651 F.2d 600, 603 (8th Cir. 1981), *citing Remmer*, 347 U.S. at 229, the Eighth Circuit held that there was outside influence in violation of defendant's Sixth

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[9] Similarly, in *Mayhue v. St. Francis Hosp., Inc.*, 969 F.2d 919 (10th Cir. 1992), a civil rights action where the court's staff found in the jury room a note containing definitions of "discriminate" and "prejudice," the court held that *Remmer* applied even in the civil context.

See also Palestroni v. Jacobs, 10 N.J. Super. 266, 271 (Sup. Ct. NJ, App.Div. 1950), where Justice Brennan, writing before his elevation to this Court, granted a defendant a new trial after a judge provided a dictionary to jurors without informing defendant's counsel, observing that "[o]n elementary principles the jury's verdict must be obedient to the court's charge and be based solely on legal evidence properly before the jury."

See State v. Harris, 530 S.E.2d 626 (S.C. 2000) (holding that a juror's use of Black's Law Dictionary violated the defendant's Sixth Amendment rights). *See also United States v. Griffith*, 756 F.2d 1244 (6th Cir. 1985), *cert. denied*, 474 U.S. 837 (1985) (holding that jury's use of dictionary to define relevant legal term is prejudicial error when it alters the jury's understanding of the law); *United States v. Williams-Davis*, 821 F. Supp. 727, 739 (D.D.C. 1993) (same); *United States v. Cheyenne*, 855 F.2d 566, 568 (8th Cir. 1988) (same).

Amendment rights where a foreperson presented to the jury her notes on "Roberts Rules of Order," taken from a guide to jury duty she borrowed from a public library.[10]

- In *United States v. Rosenthal*, 445 F.3d 1239 (9th Cir. 2006), the Ninth Circuit took up the case of a juror in a federal criminal trial who had phoned an attorney friend to ask if the juror was required to follow the judge's instructions. The friend advised the juror that she "could get into trouble" if she did not obey the judge; the juror passed this advice along to a second juror. The Ninth Circuit held that, because the attorney's advice was "extraneous information regarding the law applicable to the case" (internal quotation marks omitted), there was improper outside influence. *Id* at 1244-46, *citing Sea Hawk Seafoods, Inc. v. Alyeska Pipeline Serv. Co.*, 206 F.3d 900, 906 (9th Cir. 2000).

- In *Nevers v. Killinger*, 169 F.3d 352, 369 (6th Cir. 1999), the Sixth Circuit held that the jury had been introduced to "extraneous matters" that created at least a suspicion of improper influence where, while deliberating in a case involving white police officers who beat a black suspect, jurors viewed the movie *Malcolm X*, learned that the city was preparing for a potential riot in the event of an acquittal, and learned that

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[10] The *Bassler* court ultimately found that the government successfully rebutted the *Remmer* presumption of prejudice. *Bassler*, 651 F.2d at 603.

the defendants had been members of a controversial undercover police unit.

- In *State v. Sinegal*, 393 So. 2d 684, 687 (La. 1981), defendant was convicted of murder by a jury that consulted a 1914 compilation of "Ruling Case Law" that it found in the jury room. One juror read to the others a statement of the law regarding the impact of intoxication on intent that differed from the jury's charge. Citing *Remmer*, the court found improper outside influence, noting that "the law applied by the jury must come only from the court . . . ."[11]

Like information from a friend, a film, a dictionary, a book of debating rules, or an obsolete law code, certain passages of the Bible carry the potential to sway a jury against a defendant. Therefore, the Fifth Circuit's

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[11] So, too, in *In re Stankewitz*, 40 Cal. 3d 391 (Cal. 1985), California's highest court held that "[w]hen extraneous law enters a jury room — i.e., a statement of law not given to the jury in the instructions of the court — the defendant is denied his constitutional right to a fair trial unless the People can prove that no actual prejudice resulted." *Id.* at 397. Defendant in this case was sentenced to death for first-degree murder and robbery by a jury that included a former police officer who stated that he was expert on the relevant law due to his professional experience — and then misstated the elements of robbery under California law.

Likewise, in *Demaray v. Ridl*, 249 N.W.2d 219 (N.D. 1976), the jury in a wrongful death action found in its room a volume of caselaw that had been opened to a wrongful death case. The jury immediately set the volume aside and did not refer to it. Nonetheless, the *Demaray* court found that the trial court acted within its discretion in finding prejudicial error.

decision here and the Eleventh Circuit's decision in *McNair* — both discussed in more detail above — were correct in holding that jury consultation of the Bible is an improper external influence governed by *Remmer*.[12]

The potential influence of the Bible over a jury arises in part from the fact that many passages in the Bible are commands that are irreconcilable with contemporary federal or state law.[13] For instance, in *John* 8:1-11, Jesus refuses to authorize an execution, famously saying, "If any one of you is without sin, let him be the first to throw a stone at her." This parable could reasonably be read to mean that punishments should be imposed only by those who never have committed wrongful acts. Jurors, however,

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[12] *See also United States v. Lara-Ramirez*, 519 F.3d 76, 89 (holding that jury consultation of the Bible is no different from other "colorable claim[s] of juror taint").

[13] When we refer to "the Bible" in contemporary U.S. English, it may be assumed that we are referring to at least the Five Books of Moses, the Prophets, the Writings — called the "Old Testament" by Christians — and twenty-seven books of the New Testament. 2 NEW ENCYCLOPEDIA BRITANNICA 194 (15th ed. 2003).

The best-selling English translation of the Bible, the New International Version, can fill more than 2,000 pages, depending upon the edition. *See, e.g.*, CBA, CBA Best-Sellers (Feb. 2009), http://www.cbaonline.org/nm/documents/BSLs/Bible_Translations.pdf (reporting that the New International Version is the best-selling Bible translation at Christian retail stores in the U.S.); NIV Study Bible (2002) (2,240 pages). It is this translation that is quoted here.

are not permitted to take into consideration their own sins when deciding upon a verdict.[14]

Furthermore, the Bible situates its commandments within a narrative that imbues them with divine authority and links them with an explicit set of rewards and punishments. So, for instance, Moses says in *Deuteronomy*: "See, I am setting before you today a blessing and a curse — the blessing, if you obey the commands of the LORD your God that I am giving you today; the curse if you disobey . . . ." (*Deuteronomy* 11:26-28) The Bible may thus be read by jurors as a law code that preempts all others.

With respect to capital punishment, too, there are many Biblical passages that seem to be inconsistent with current U.S. law. For example, *Numbers* 35:16 — one of the passages actually consulted by the *Oliver* jurors — ordains that a person who murders another "with an iron object . . . shall be put to death." By contrast, the Constitution requires "consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. at 304. Thus, "[a] process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense" can be understood to be both Biblically mandated and constitutionally impermissible. *Id.*; *see also Jones v.*

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[14] *See, e.g.*, TEX. CODE CRIM. PROC. art. 35.22; Federal Judicial Center, PATTERN CRIMINAL JURY INSTRUCTIONS § 1A (1987).

Kemp, 706 F. Supp. 1534, 1560 (N.D. Ga. 1989); *Robinson v. Polk*, 444 F.3d 225, 227 (4th Cir. 2006) (Wilkinson, J., concurring) ("If the presence of a Bible in the jury room drives the collective discussion, and renders a capital sentence the result of religious command, then in my view, an important line has been crossed.").

As a practical matter, the Bible will affect every juror differently. Such effects can vary depending upon which passages are being read, by whom, to whom, in what context, and for how long. Therefore, the key question for a trial court where a jury has consulted the Bible — whether there is a colorable claim that the Bible potentially biased the jury — is not subject to broad generalization.

To the extent that the Fourth Circuit holds otherwise, it has misread *Remmer* and its progeny. For instance, in *Robinson v. Polk*, 438 F.3d 350 (4th Cir. 2006), the Fourth Circuit rejected a *habeas* petition by a death-row inmate who argued that his Sixth Amendment rights were denied where

> (1) a juror asked for, and the bailiff provided, a Bible during sentencing deliberations; (2) the juror read an 'eye for an eye' passage[15]; (3) the passage was read to the other jurors before a final vote on a death sentence; and (4) the juror read the passage in an attempt to convince his fellow jurors to vote for a death sentence.

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[15] The *Robinson* court noted that there are three separate passages in the Hebrew Bible where the phrase "eye for an eye" is used and assumed the jurors were referring to one of them. *Id.* at 359 n.8.

Id. at 358-359 (footnote omitted). Taking defendant's allegations as true, the Fourth Circuit refused to find that the trial court was unreasonable in denying defendant's request for a hearing. Instead, the court held that there is an outside influence only where there is "private communication, contact, or tampering with a juror" which "impose[s] pressure upon a juror apart from the juror himself." *Id.* at 363. Applying this rule, the court found that "the Bible is not an 'external' influence" because "the reading of Bible passages . . . . invites the listener to examine his or her own conscience from within." *Id.* In some cases, consultation of the Bible may well invite a jury to perform its duty scrupulously. In other cases, consultation of the Bible may invite a jury to convict or acquit a defendant without regard to the evidence in the case. In light of the fact that there are thousands of pages in the Bible, far more potential listeners than that, and a nearly infinite number of legal questions that can be posed to a jury, the Fourth Circuit has surprising confidence in its generalization about the effect of the Bible upon juror listeners.

The strained logic of the Fourth Circuit's *Robinson* decision results in an unreasonably narrow definition of "outside influence" that simultaneously allows *Remmer* to stand while circumventing it. Put another way: the Fourth Circuit's opinion enables habeas and appeals courts to peremptorily dispose of allegations of Sixth Amendment violations by deferring to trial courts' conclusory findings of fact without doing more. As a result, the protections crafted in *Remmer* are rendered

toothless, along with the underlying Sixth Amendment right.[16]

The Ninth Circuit's decision in *Fields* similarly circumvents the Sixth Amendment protections articulated in *Remmer*. There, a capital sentencing jury discussed notes presented by the foreperson on Biblical passages relating to the death penalty. The notes included the following language:

- "'He that smiteth a man, so that he dies, shall surely be put to death.'" (*Exodus* 21:12)

- "'Let everyone be subject to the higher authorities, for there exists no authority except from God, and those who exist have been appointed by God. Therefore, he who resists the authority, resists the ordinance of God; and they that resist bring on themselves condemnation.'" (*Romans* 13:1-5)

- "'Per Paul's letter to Romans: State has power for two reasons — 1. Satisfy demand's [sic] of God's service [and] 2. Protect society by deterring future crime.'"

Fields v. Brown, 503 F.3d at 778. The *Fields* plurality distinguished its own precedents on improper outside influence, noting that "the Biblical verses . . . contained

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[16] The Fourth Circuit has decided three additional cases involving juror Bible consultation in a manner consistent with *Robinson*: *Burch v. Corcoran*, 273 F.3d 577 (4th Cir. 2001), *Billings v. Polk*, 441 F.3d 238 (4th Cir. 2006), and *Lenz v. Washington*, 444 F.3d 295 (4th Cir. 2006).

in the notes are notions of general currency that inform the moral judgment that capital-case jurors are called upon to make" and that the notes made "general, commonly known points." *Id.* at 780.[17]

It is arguable whether, for instance, the content of *Romans* 13:1-5 ("'[H]e who resists . . . authority, resists the ordinance of God'") was in 2006 a "notion of general currency" amongst Californian jurors. Yet even if this were true, such a conclusion would have no bearing here. When jurors have been consulting the Bible, the court cannot avoid asking whether such consultation can potentially bias the jury's decision.

In support of its approach, the Ninth Circuit relied only on *Sawyer v. Whitley*, 505 U.S. 333, 370 (1992) — where Justice Stevens wrote that capital sentencing deliberations are "a matter of reasoned moral judgment" — as well as cases affirming that it is proper for deliberating jurors to resort to their personal knowledge and experiences. *Fields*, 503 F.3d at 780. That jurors may inform death penalty deliberations with their own moral views does not allow for the introduction of the Bible — an outside source — as a resource for consultation when deciding whether to impose a sentence of death. *See Robinson*, 444 F.3d at 226 (Wilkinson, J., concurring in denial of reh'g en banc).

Moreover, the guidance of the Fourth and Ninth Circuits cannot be applied by lower courts in a consistent and non-arbitrary manner. On the contrary, the

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[17] Distinguishing the facts, the court then held that it was not necessary to decide whether the conduct at issue here gave rise to an outside influence. *Fields*, 503 F.3d at 780-81.

questions raised by the Fourth and Ninth Circuit tests can be legion and divisive. Do all books of the Bible contain "common knowledge"? Which other religious texts are authorized as containing "notions of general currency"? *Fields*, 503 F.3d at 785 (Gould, J., dissenting); *see also Robinson*, 444 F.3d at 227 (Wilkinson, J., dissenting from denial of reh'g en banc) ("The jury room is not the place to debate the respective merits of the Bible, the Koran, the Torah, or any other religious scripture that Americans revere . . . ."). What about "street-corner wisdom such as might be found in popular novels of any number of current authors whose books line the supermarket shelves?" *Fields*, 503 F.3d at 785-86.

The *Remmer* rule is not subject to the same ad-hoc determinations by lower courts. Rather, under *Remmer*, whenever there is a colorable claim of improper jury consultation of the Bible, the inquiry would focus on the sole question that should be before the court: whether the consultation of the Bible potentially tainted the jury's verdict.[18]

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[18] Some have objected that, if *Remmer* governs juror Bible consultation, it would follow logically — or at least via a slippery slope — that *Remmer* would govern whenever a jury discusses Biblical precepts, or perhaps even any precepts that can be traced back to the Bible. *See, e.g.*, *Fields*, 503 F.3d at 780 ("It is difficult to see how sharing notes can be constitutionally infirm if sharing memory isn't"). But there are good reasons to refrain from extending *Remmer* in this manner. First, written texts are qualitatively different from individuals' recollections, carrying far greater authority. *People v. Harlan*, 109 P.3d 616, 632 (Colo. 2005) ("The written word persuasively conveys the authentic

(Cont'd)

Furthermore, in the context of juror consultation of the Bible, a rule that is focused on the use of a book, as opposed to a judicial inquiry into cultural norms, is eminently practical. The court's inquiry can be anchored on the actions of jurors in relation to the physical text — who introduced it, who read it, what pages were read, for how long — in a way that will obviate the necessity to inquire into the content of jurors' discussions directly.[19] This line of reasoning finds support all the way back in *Mattox*, 146 U.S. at 148-149 (U.S. 1892), which notes with approval a case where the Kansas Supreme Court agreed to receive juror testimony to impeach a verdict where what was at issue was "an overt act, open to the knowledge of all the jury," as opposed to a question of "consciousness" far less amenable to judicial inquiry.

(Cont'd)

ring of reliable authority in a way the recollected spoken word does not.") Perhaps more important, in the case of remembered Biblical teachings, there is no outside "contact" or "communication" into which the court can inquire without intruding into the heart of the jury's deliberative process. Nor in the context of juror recollection of the Bible and its teachings is there any sort of **extrinsic item** introduced — *e.g.*, the actual Bible itself.

[19] The wisdom of the *Remmer* rule is evident when it is read alongside the evidentiary rule that jurors may not impeach their own verdicts by testifying about their deliberative process. *See* note 8 above; *see also* TEX. R. CIV. PRO. Rule 327(b); 23A CORPUS JURIS SECUNDUM, CRIMINAL LAW § 1915 (2008) (stating the language of Federal Rule of Evidence 606(b), and then noting that "[s]everal states have adopted a similar rule or statutory provision," citing the law of eleven states as examples). Defendants who allege outside influence are therefore often barred from presenting the facts most relevant to the adjudication of their constitutional rights.

D. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW IRRECONCILABLY CONFLICTS WITH DECISIONS FROM OTHER U.S. COURTS OF APPEALS ABOUT THE STANDARD FOR EVALUATING POSSIBLE PREJUDICE FROM JUROR BIBLE CONSULTATION.

Even where courts agree that Bible consultation may violate the Sixth Amendment, there is disagreement regarding the appropriate standard to be used by a federal court engaged in review for potential prejudice, as the Fifth Circuit below correctly noted. *Oliver*, 541 F.3d at 341 n.13.

In *McNair v. Campbell*, 416 F.3d at 1307-09, the Eleventh Circuit, reviewing petitioner's claim of prejudice stemming from the jury's consideration of Bible passages during its deliberations, chose to apply the standard used in *Remmer*: any evidence coming into the jury room not originating from the witness stand is "presumptively prejudicial." *Id.* at 1307, *citing Remmer*, 347 U.S. at 229. Under this long-established standard, once petitioner made a showing that jurors had contact with extrinsic evidence, the burden then shifted to the state to rebut this presumption by showing that the jurors' consideration of the extrinsic evidence was harmless to the defendant. *Id.*

By contrast, the Fifth Circuit's decision below held that it would only be appropriate to grant petitioner relief based on the constitutional error of juror Bible consultation if petitioner could show that the error "had a substantial and injurious effect or influence in determining the jury's verdict," the standard set out in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). *Oliver*, 541 F.3d at 341, *citing Brecht*, 507 U.S. at 637.

In using the *Brecht* standard to evaluate Oliver's claim, the Fifth Circuit joined the Ninth Circuit, which, in *Fields v. Brown*, 503 F.3d at 787, placed the burden on the petitioner to show that the consideration of extraneous material had a "substantial and injurious effect or influence" on the jury.[20]

The absence of a clear rule regarding the proper standard to apply when evaluating a claim of juror Bible consultation creates great uncertainty in the context of capital sentencing — an area where uncertainty is most undesirable.[21] In addition, a decision regarding the rule to be applied in evaluating prejudice — whether it be the *Brecht* standard, an irrebuttable presumption of prejudice, or something else — may be a significant factor in determining the outcome of such evaluations.

Given the division among the courts and the importance of the recurring issue, this Court should provide clear instruction regarding the correct procedure to be followed in evaluating violations of Sixth Amendment rights.[22]

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[20] *Fields* was decided on this question; it assumed, without deciding, that there was juror misconduct. *Fields*, 503 F.3d at 781.

[21] *See* note 4.

[22] *Amici* believe that this Court, in considering the appropriate standard for ascertaining prejudice arising from jury consultation of the Bible, also should consider whether such consultation during the sentencing phase of a capital case should raise an irrebuttable presumption of prejudice. At this stage, *amici* take no position on this issue.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

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